Supreme Court, U. S.
FILED
JUL 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-4

EARL M. POPE, DOLORES POPE, EDWIN E. POPE, DOLORES O. POPE, EDITH POPE,

Petitioners,

v.

CINCINNATI GAS & ELECTRIC CO., DAYTON POWER & LIGHT CO.,

Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BEIRNE & WIRTHLIN

By C. R. Beirne
2912 Carew Tower, 441 Vine St.
Cincinnati, Ohio 45202
(513) 621-5370
Attorneys for Respondents

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
Whether the provisions of Section 163.09 (B), Ohio Revised Code, stating that a determination by a trial court in favor of an appropriating agency on the preliminary question of the necessity to make the appropriation "shall not be a final order for purposes of appeal" and that the cause must proceed to an assessment of compensation prior to an appeal, is violative of due process of law.	
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	4
FACTS	6
REASONS TO DENY WRIT	7
CONCLUSION	15

APPENDIX

The Cincinnati Gas & Electric Co., et al. v. John T. Nieman, et al., Court of Appeals, First Appellate District, Butler County, Ohio, Nos. CA 74100086 and CA 74100087 Opinion (June 30, 1975)	1a-18a
Section 163.06, Ohio Revised Code	19a-20a

TABLE OF AUTHORITIES

CASES

	Page
Allied Stores of Ohio, Inc. v. *Bowers*, 358 U.S. 522 (1959)	14
City of Oakland v. *United States*, 124 F.2d 959 (9th Cir. 1942), *cert. denied*, 316 U.S. 679 (1942)	13
Griffin v. *Illinois*, 351 U.S. 12 (1956)	14
Massachusetts Bd. of Retirement v. *Murgia*, 427 U.S. 307 (1976)	14
McGinnis v. *Royster*, 410 U.S. 263 (1973)	14
Mitchell v. *W. T. Grant Co.*, 416 U.S. 600 (1974)	14
Nashville I-40 Steering Committee v. *Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968)	8
Ortwein v. *Schwab*, 410 U.S. 656 (1973)	14
Travis v. *United States*, 287 F.2d 916 (Ct. Cl. 1961), *cert. denied*, 386 U.S. 824 (1961)	13
United States v. *40.75 Acres of Land*, 76 F. Supp. 239 (N.D. Ill. 1948)	13
United States v. *Kras*, 409 U.S. 434 (1973)	14
Youngstown Municipal Railway Co. v. *Youngstown*, 147 Ohio St. 221 (1946)	5

STATUTES

	Page
Article I, Section 19, Ohio Constitution	12
Article IV, Section 3 (B) (2), Ohio Constitution	7
Article IV, Section 6, Ohio Constitution	5, 7
Amendment XIV, United States Constitution	14
Chapter 163, Ohio Revised Code	9
Section 163.06, Ohio Revised Code	4, 11
Section 163.09, Ohio Revised Code	2, 4, 7, 11
Section 163.15, Ohio Revised Code	3, 11
Section 163.19, Ohio Revised Code	3, 11, 13
40 U.S.C. Section 258 (a)	12

MISCELLANEOUS

	Page
P. Nichols, *The Law of Eminent Domain*, (rev. 3rd ed. 1976)	11-12
Note, *Ohio's Uniform Eminent Domain Act: Transfer of Title and Possession*, 27 Ohio St. L.J. 525 (1966)	10

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-4

EARL M. POPE, DOLORES POPE, EDWIN E. POPE, DOLORES O. POPE, EDITH POPE,
Petitioners,

v.

CINCINNATI GAS & ELECTRIC CO., DAYTON POWER & LIGHT CO.,
Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

QUESTION PRESENTED

Whether the provisions of Section 163.09 (B), Ohio Revised Code, stating that a determination by a trial court in favor of an appropriating agency on the preliminary question of the necessity to make the appropriation "shall not be a final order for purposes of appeal" and that the cause must proceed to an assessment of compensation prior to an appeal, is violative of due process of law.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The following provisions of the Ohio Revised Code were not printed in the argument portion of the petitioners' brief and have been added below because of their importance to the issues raised by the petition and this brief.

Section 163.09 (B)

"When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. *If as to any or all the property or other interests sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. An order of the court in favor of the agency on any of such questions or on qualification under section 163.06 of the Revised Code, shall not be a final order for purposes of appeal.* An order of the court against the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal. If a public agency has taken possession prior to such order and such order, after any appeal, is against the agency on any of such questions, *the agency shall restore the property to the owner in its original condition or respond in damages,* which may include the items set forth in division (B) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents." (Emphasis supplied).

Section 163.15 *When agency entitled to possession; transmission of final journal entry.*

"As soon as the agency pays to the party entitled thereto or deposits with the court the amount of the award and the costs assessed against the agency, it may take possession; provided, that this shall not be construed to limit the right of a public agency to enter and take possession, as provided in section 163.06 of the Revised Code. When the agency is entitled to possession the court shall enter an order to such effect upon the record and, if necessary, process shall be issued to place the agency in possession. Whenever a final journal entry in an appropriation proceeding, granting to this state a fee title or any lesser estate or interest in real property is filed and journalized by the clerk of courts, the clerk of courts shall forthwith transmit to the county auditor a certified copy of said final journal entry who shall transfer the property on his books and transmit said entry with proper endorsement to the county recorder for recording. The costs of filing such final journal entry with the county auditor and the county recorder shall be taxed as costs in the appropriation proceedings the same as other costs are taxed under section 163.16 of the Revised Code."

Section 163.19 *Appeal; right to use property not affected.*

"Subject to sections 163.07 and 163.09 of the Revised Code, any party may prosecute appeals as in other civil actions from the judgment of the court. The trial court upon proper terms may suspend the execution of any order; but in all cases where the agency pays or

> deposits the amount of the award assessed and *gives adequate security for any further compensation and costs, as required by the court,* the right to take and use the property appropriated shall not be affected by such review by the appellate courts." (Emphasis supplied).

See also Section 163.06, Ohio Revised Code, attached hereto as Appendix 2.

STATEMENT OF THE CASE

There are several omissions and inaccuracies contained in the petitioners' Statement of the Case.

The petitioners are in error in describing the trial court's determination of the issues presented prior to an award of compensation as a "judgment." The Ohio General Assembly obviously carefully worded Section 163.09(B), Ohio Revised Code, to avoid use of the term "judgment" under such circumstances. It is a preliminary "determination" only.

The petitioners correctly state at page 4 of their brief that almost three years elapsed between the time the instant complaints were filed and the cases were decided at trial. It is incorrectly stated at page 16, footnote 16, of the petitioners' brief, however, that,

> "The Ohio Supreme Court clearly overlooked the fact that the Respondent utility companies in this case are hardly in a position to urge that the case proceed expeditiously *inasmuch as they waited almost two years after filing the case before trying it,* despite the fact that Chapter 163 provides that such cases may be tried within fifteen days of the filing of the answer."

It was explained to the Supreme Court that at the time the complaints were filed, there were other consolidated appropriation cases which had been tried and were pending on appeal. They were *Cincinnati Gas & Electric Co., et al.* v. *John T. Nieman, et al.,* CA 74100086 and CA 74100087 (Ohio First District Court of Appeals, decided June 30, 1975), *cert. denied,* No. 75-743 (Ohio Supreme Court, October 16, 1975), *cert. denied,* No. 75-990 (United State Supreme Court, March 22, 1976). (See Opinion of Ohio First District Court of Appeals attached hereto as Appendix 1). The *Nieman* cases involved the same electric transmission line and route, and the property owners were represented by the same counsel as in the present cases. Indeed, all of the same defenses were raised in the answers in the *Nieman* cases and were ultimately decided adversely to the property owners. Thus, the present cases were intentionally delayed until after the appellate courts had had an opportunity to review the controlling questions of law presented by the *Nieman* appeals.

Finally, the petitioners failed to inform the Court that on November 25, 1977, the respondents filed a motion to dismiss the petitioners' appeal to the Ohio Supreme Court as having been improvidently allowed. The motion recited the fact that several of the case authorities relied upon in the petitioners' brief had been effectively overruled by an Amendment to Article IV, Section 6, of the Ohio Constitution which was passed by the people of Ohio and went into effect on January 1, 1945. For the first time, the Amendment gave to the Ohio General Assembly the power to determine the jurisdiction of the Court of Appeals in Ohio. *See, e.g., Youngstown Municipal Railway Co.* v. *Youngstown,* 147 Ohio St. 221 (1946). The petitioners' brief had relied upon cases decided prior to the Amendment which were no longer applicable to argue that it had

no such power. The motion to dismiss became moot, however, when the appeal was decided on the merits favorably to the respondents.

FACTS

The petitioners have incorrectly represented to the Court at page 7 of their brief that construction of the respondents' transmission line towers on the petitioners' property will cause "irreversible damage to a fragile hillside." This claim is directly controverted by the findings contained in the opinion of the Common Pleas Court, wherein the Court said:

> "Now, in the construction of these bases for these towers * * * I think the evidence shows [that] once you have placed your concrete in there and restore the slope to its natural slope [there is] no reason at all why it shouldn't be as non-slippable as it was before it went in and, it would certainly create less of a slippage problem than the road going up the hill, which has to stay by its very nature, has to remain in the cut and fill condition." See petitioners' appendix, page 7a.

As the trial court observed, the petitioners had constructed a road on the hillside in question, resulting in a very real problem of slippage of the hillside which will not be caused by the transmission line towers. These facts directly contradict petitioners' representation that construction of the towers will cause "irreversible damage to a fragile hillside."

REASONS TO DENY WRIT

A threshold reason for denial of the writ, which the petitioners' brief completely ignores, is that this appeal was brought before the trial court had had an opportunity to adjudicate all of the matters to be determined prior to a final judgment; namely, assessment of compensation.

The 1944 Amendment to Article IV, Section 6, of the Ohio Constitution gave the Legislature the power to define the jurisdiction of the Courts of Appeals by providing that, "The courts of appeals shall have * * * such jurisdiction *as may be provided by law* to review, affirm, modify, set aside or reverse judgments * * *." In 1968, the Ohio Constitution was again amended, and retained the same provision as part of Article IV, Section 3 (B) (2). The Legislature thus exercised its constitutionally conferred powers by stating in Section 163.09, Ohio Revised Code, that an order issued prior to an award of compensation "shall not be a final order for purposes of appeal." In the face thereof, there is no overriding federal constitutional principle of which the respondents are aware which precludes a state legislature from requiring by statute that all matters in controversy be presented and decided at trial before an appeal can be taken.

Furthermore, the evidence presented in the trial court did not involve a challenge to the respondents' "right to take" as suggested by the petitioners. Instead, their evidence went entirely to the question of whether the respondents committed an abuse of discretion in determining the *necessity to build the line* on the petitioners' property. More specifically, the petitioners contended at trial and will later argue on appeal that there is no need for the line and that it should be moved off of their property and onto their neighbors' property. Under Section 163.09, this

"necessity" issue is entirely separate and apart from the question of whether the respondents have the *right to make the appropriation.*

Certainly, the question which the petitioners want to raise of whether the improvement should be placed on someone else's property is not one which the courts have looked upon with favor. As stated by the United States Sixth Circuit Court of Appeals in a case involving construction of a new highway in the State of Tennessee:

> "It would be virtually impossible to select a route for an interstate highway through a congested metropolitan area without working hardships upon many citizens. Appellants suggest possible alternative routes which they contend would avoid the unfortunate economic consequences which the proposed route will impose upon the North Nashville area. Alternative routes undoubtedly would impose hardships upon others. The minimizing of hardships and adverse economic effects is a problem addressing itself to engineers, not judges. The providing of just compensation to property owners falls within the purview of the laws of eminent domain." *Nashville I-40 Steering Committee* v. *Ellington,* 387 F.2d 179, 185 (6th Cir. 1967), *cert. denied,* 390 U.S. 921 (1968).

Moreover, the facts in the instant cases do not present the question whether construction of the transmission line prior to exhaustion of appeals is prejudicial to the rights of the property owners and violative of constitutional rights. The proposed route for the line was specifically designed to avoid removal of buildings or other structures on the properties affected. Actually, the properties in question are not the residences of the petitioners, but consist of vacant land purchased and held for purposes of investment. If the line were to be constructed prior to exhaustion of appeals and an appellate court were subsequently to order

that it be moved to a neighbor's property, the towers couid be pulled out of the ground and the petitioners' property could be restored to its former condition without any permanent damage. This situation is, therefore, not at all comparable to one which might involve the demolition of structures in order to construct the improvements.

THE OHIO EMINENT DOMAIN STATUTES

The Ohio statutes governing the procedures for appropriation of property are only peculiar to Ohio. They are a product of a long history of development and refinement of the Ohio law which culminated in 1966 with the enactment of Chapter 163, Ohio Revised Code. Some of the overriding objectives of the Ohio General Assembly in reorganizing the appropriation statutes in 1966 were summarized shortly after the statutes went into effect as follows:

> "At the time of the enactment of the Uniform [Eminent Domain] Act there were fourteen separate, distinct and complete procedures by which eminent domain could be exercised, making it difficult for landowners and appropriating agencies to know whether they were following the correct procedure. *Litigation over procedural technicalities was excessive. The number and variety hindered the evaluation of the procedures and encouraged their misuse. For these reasons the Ohio Legislative Service Commission and the Eminent Domain Committee of the Ohio Bar Association recognized the need for a uniform procedure which could be used whenever eminent domain was exercised. Furthermore, sentiment for reform was created by outdated procedures which produced bottlenecks in important public projects and which levied undue hardships on land owners. The recognition of the need for uniformity and reform culminated in the enactment of Ohio's Uniform Eminent Domain Act.* Whether the act permits the courts to perform properly their functions of ensuring just compensation

and administering transfer of title and possession is yet to be determined.

"Since the fairness and efficiency of Ohio's Uniform Act are determined by balancing the competing interests of landowners and appropriating agencies, it is important that these interests be understood. If either party is able to use the proceeding as a club to coerce an unjust settlement, the purpose of the proceeding is defeated. Likewise, neither party should be afforded an unfair advantage in presenting its case to the jury. *The appropriation agency is interested in immediate possession of the property so that it can begin improving and using the property without the delay caused by litigation.* Owners, on the other hand, want adequate time to relocate. The agency seeks to minimize the cost of appropriation, while the landowner generally feels that the agency's offers are wholly inadequate. The task confronting the draftsmen of the Ohio act was to blend these competing interests into a fair and efficient proceeding." (Emphasis supplied). Note, *Ohio's Uniform Eminent Domain Act: Transfer of Title and Possession*, 27 Ohio St. L. J. 525, 527-28 (1966).

Thus, the Legislature sought to avoid the frustration or defeat or long delay of public projects which can often be caused by years of litigation. These cases are, in fact, a prime example of the evils occasioned by procedural delay. The transmission line in question was originally planned in 1970 for construction in 1975. It is needed to serve two new electrical generating units which cost a total of approximately $250,000,000.00 to build and install. The efforts of the petitioners' counsel, however, have now resulted in over four years of delay in order to litigate procedural issues similar to the ones presented on this appeal. These delays have obviously come at a considerable cost to the respondents and have resulted in a continuing denial to the general public of essential benefits and services which the proposed transmission line will bring to an area in southwest Ohio which is in the process of considerable residential, commercial and industrial development.

In fact, the petitioners are complaining of a procedure which guarantees a due process hearing and a jury award of compensation prior to the time that possession of their property vests in the respondent. Actually, under Section 163.06, Ohio Revised Code, a *public* agency (such as the state, a county or municipality — as distinguished from a utility) is entitled to possession of unimproved property *prior* to a hearing and *prior* to a jury award simply by filing a petition and depositing into a Court of Common Pleas an amount equal to the estimated value of the take. This procedure, which was not used in these cases, is obviously far more restrictive of the rights of the property owners than that provided by Sections 163.09 (B), 163.15 and 163.19, Ohio Revised Code, for agencies such as the respondent utilities in the present case. If the Section 163.06 procedure passes constitutional muster, which it does, as shown below, then the procedure under attack in these cases is unquestionably valid, and there is no reason for review of it by this Court.

COMPLIANCE WITH DUE PROCESS

Nowhere in the petitioners' brief do they cite any cases which provide direct support for the proposition they assert. Their argument consists entirely of a philosophical discussion of general principles of law which have little or nothing to do with the facts and law relevant to the present case.

The probable reason the petitioners have come up empty in their search for supporting authorities is that the validity of statutes authorizing immediate possession of property by appropriating agencies is well established. *See* P.

Nichols, *The Law of Eminent Domain,* Section 27.25 (rev. 3rd ed. 1976) (and the authorities cited therein). The law is clear that so long as compensation is paid to the owner, the constitutional requirements are fulfilled. *Id.* Section 8.71; *see* Article I, Section 19, Ohio Constitution. This principle applies to private corporations as well as to public agencies. P. Nichols, *The Law of Eminent Domain, supra,* at Section 8.712.

Under 40 U.S.C. Section 258(a) (1931), the Federal Government has long had the power to issue a declaration of taking which, when filed in a District Court together with a deposit of the estimated compensation, operates immediately to vest title to the property in the United States of America. The only right given to the property owner is that of just compensation with interest. Most, if not all, state jurisdictions provide for a similar "quick take" procedure. *See* P. Nichols, *The Law of Eminent Domain, supra,* at Sections 8.71, 8.712-8.713. The following discussion of the constitutionality of Section 258(a) is representative of the views of courts everywhere on this issue:

> "This argument in effect questions the constitutionality of the Declaration of Taking Act, which provides that the Government takes title to property immediately upon the filing of the declaration and the payment into court of the estimated value of the property taken. Long before the passage of the Declaration of Taking Act, the Supreme Court held that the Fourteenth Amendment is not violated by the provision of a state condemnation law authorizing the taking of possession prior to the final determination of the amount of compensation and the payment thereof, if adequate provision is made for compensation. *Backus* v. *Fort Street Union Depot Co.,* 1898, 169 U.S. 557, 18 S.Ct. 445, 42 L.Ed. 853. The provision in the Declaration of Taking Act for the payment into court of the estimated value of the property sought to be

> condemned, and the provision that if just compensation as finally determined exceeds the amount deposited in court, judgment shall be entered against the United States for the deficiency at six percent interest from the date of the taking, have been held to be adequate provision for compensation. *City of Oakland* v. *United States,* 9 Cir., 1942, 124 F.2d 959, certiorari denied, 1942, 316 U.S. 679, 62 S.Ct., 1106, 86 L.Ed. 1753. Furthermore, unlike the type of condemnation in the Barnidge case, further protection is afforded property owners by the provision that the Government cannot abandon a condemnation under the Declaration of Taking Act, but must carry it through to completion, including the payment in full of the compensation ultimately awarded. *Catlin* v. *United States,* 1945, 324 U.S. 229, 241, 242, 65 S.Ct. 631, 89 L.Ed. 911; 40 U.S.C.A. Sections 258c and 258e. I must therefore hold that the defendants' contentions going to the constitutionality of a Declaration of Taking Act condemnation have already been raised and decided adversely to them in the foregoing cases, which I regard as controlling here." *United States* v. *40.75 Acres of Land,* 76 F. Supp 239, 243 (N.D. Ill. 1948).

The respondents rely upon *40.75 Acres of Land* and the authorities cited in the above passage as controlling precedent which is fully dispositive of the issues raised by the petitioners. *See also Travis* v. *United States,* 287 F.2d 916, 919 (Ct. Cl. 1961), *cert. denied,* 368 U.S. 824 (1961); and *City of Oakland* v. *United States,* 124 F.2d 959 (9th Cir. 1942), *cert. denied,* 316 U.S. 679 (1942). As noted above at page 3, Section 163.19 provides:

> "The trial court upon proper terms may suspend the execution of any order; but in all cases where the agency pays or deposits the amount of the award assessed and gives adequate security for any further compensation and costs, as required by the court, the

right to take and use the property appropriated shall not be affected by such review by the appellate courts."

The petitioners have injected an equal protection argument into their brief in citing and quoting from *Griffin* v. *Illinois,* 351 U.S. 12 (1956). See petitioners' brief, p. 14. Their argument under *Griffin,* however, should be rejected out of hand because the issue presented in their petition invokes only the guarantees of the due process provision and not the equal protection provision of the Fourteenth Amendment of the United States Constitution.

In any event, *Griffin* v. *Illinois, supra,* involves state discrimination against indigent criminal defendants who cannot afford an appeal vis-a-vis other criminal defendants who are able to afford an appeal. This is a totally inapposite situation to the facts of the present case. It is only when a classification of persons under state law cannot be supported on any rational basis, as in *Griffin,* that this Court has found violation of the equal protection clause. *Compare Griffin with Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307 (1976); *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600 (1974); *McGinnis* v. *Royster,* 410 U.S. 263 (1973); *Ortwein* v. *Schwab,* 410 U.S. 656 (1973); *United States* v. *Kras,* 409 U.S. 434 (1973); *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959). Here, there is a rational basis for the procedures employed and all property owners in Ohio are given equal treatment under the law. The petitioners' argument is completely devoid of substance.

CONCLUSION

There is no plausible reason why this Court should grant the petition for writ of certiorari. The Ohio procedure for appropriation of property under review goes far beyond the long recognized due process requirements applicable to appropriation procedures. Contrary to the petitioners' assertion, the facts as found by the trial court do not justify the assertion that the construction of the towers on petitioners' property will cause "irreversible damage to a fragile hillside." In addition, the provisions of the Ohio statute adequately provide for the assurance of further compensation and costs if justified by the facts. For all of the foregoing reasons, it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted,

C. R. BEIRNE
BEIRNE & WIRTHLIN
2912 Carew Tower
Cincinnati, Ohio 45202
Attorneys for Respondent

APPENDIX 1

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

THE CINCINNATI GAS AND ELECTRIC COMPANY, ET AL.,
Plaintiffs-Appellants-Cross-Appellees,
v.
JOSEPH N. DAVIES, ET AL.,
Defendants-Appellees-Cross-Appellants.

NO. CA 74-10-0086
OPINION
(Filed June 30, 1975)

THE CINCINNATI GAS AND ELECTRIC COMPANY, ET AL.,
Plaintiffs-Appellants-Cross-Appellees,
v.
JOHN T. NIEMAN, ET AL.,
Defendants-Appellees-Cross-Appellants.

NO. CA 74-10-0087
OPINION
(Filed June 30, 1975)

APPEAL ON QUESTIONS OF LAW
FROM COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

Messrs. Beirne and Wirthlin, C. R. Beirne and Michael A. Fulton of counsel, 2912 Carew Tower, Cincinnati, Ohio 45202, for Plaintiffs-Appellants,

Messrs. Robert E. Manley, 2205 Carew Tower, Cincinnati, Ohio 45202, and Thomas W. Baden, 804 First National Bank Building, Hamilton, Ohio 45011, for Defendants-Appellees,

Mr. Kenneth Heuck, Jr., 2303 Central Trust Tower, Cincinnati, Ohio 45202, for Intervenors.

BY THE COURT.

The Cincinnati Gas and Electric Company and Dayton Power and Light Company sought to appropriate easements over lands of Davies and Nieman by separate actions under Section 163 et seq. of the Revised Code. The respective defendants filed their answers timely and denied that the parties had been unable to agree as to compensation, denied the necessity of the appropriation and specifically alleged many other reasons why the appropriation should be disallowed. The two actions were consolidated for purpose of trial. The defendants challenged the necessity of the appropriation and after several days of trial the court denied the right of Cincinnati Gas and Electric Company and Dayton Power and Light Company to make the appropriation. Cincinnati Gas and Electric Company and Dayton Power and Light Company will hereinafter be referred to as the Agencies and the defendants as the owners. It is from this judgment that the Agencies appeal to this Court.

The Agency, Cincinnati Gas and Electric Company, was the owner of the Miami Fort Power station, located at the junction of the Ohio and Great Miami Rivers. It entered into an agreement to build two new generating units at this

station with the Agency, Dayton Power and Light Company, and to construct a new transmission line from the new units to the Dayton area. The sole responsibility for constructing this line as far as the Village of Seven Mile was upon the Agency, Cincinnati Gas and Electric Company. Beyond Seven Mile the responsibility was that of Dayton Power and Light Company. The properties of the defendants in these proceedings was on that part of the line that the Agency, Cincinnati Gas and Electric Company, was responsible for constructing.

The court rendered its opinion which was styled a Judgment. Four days later the court approved a Supplemental Judgment Entry, the effect of which was to deny the appropriation in these two cases.

In addition, defendants have filed cross-appeals claiming that Chapter 163 is unconstitutional.

There is also an appeal by Jennings E. Stiles and Dorothy Stiles, who claim some interest in the proceedings as an adjacent property owner. These parties sought leave to intervene in these cases and their motion was overruled by the trial court.

* * *

The judgment in this case is composed of two separate entries. The first is in the form of an opinion by the trial court. Four days later, a second entry was placed upon the Journal. It is styled "Supplemental Judgment Entry."

In the opinion entry the court found that defendants did not carry their burden of proof that the safety and welfare of humans and animals was in jeopardy. The court found that plaintiffs had considered aesthetic matters as they related to structure design, shrub and tree maintenance. The court found that underground installation would be too costly and out of the question. The court

also found that plaintiffs did look at several vastly different transmission corridors, including the underground approach.

Thereafter, the court found that although the line was necessary, there was no necessity for it on the route laid out by plaintiffs. In fact, it stated that the line was inevitable and "when the Agency does it right – they have the right to the line – it is for the welfare of the people and the private land must be made subservient to that end." The court then stated that the plaintiffs abused their discretion in not having the Environmental Impact Study made and submitted to the Board of Directors prior to the decision to appropriate plaintiffs' property. The court also found that the Agencies did not take into account the interests of the public when they laid out the transmission line corridor.

These findings and judgment of the court were incorporated in a Supplemental Judgment Entry four days later which also declared Chapter 163 R. C. to be constitutional.

Appellant Agencies have filed herein their assignments of error as follows:

ASSIGNMENT OF ERROR NO. 1. The trial court erred in ruling that the Cincinnati Gas and Electric Company and the Dayton Power and Light Company were guilty of bad faith and an abuse of discretion in determining the necessity for the acquisition of easements over the properties of each of the two owners in the present action.

ASSIGNMENT OF ERROR NO. 2. The trial court erred in ruling that the Cincinnati Gas and Electric Company was guilty of bad faith and an abuse of discretion when the utility adopted changes in the specific route for the Miami Fort to Seven Mile Transmission Line, without first seeking the approval of its Board of Directors to make such changes, even though the changes in no way affected the location of the easements sought over the properties of each of the two owners in the present action.

ASSIGNMENT OF ERROR NO. 3. The trial court erred in ruling that the Cincinnati Gas and Electric Company was guilty of bad faith and an abuse of discretion in not submitting an environmental report prepared by an outside consulting firm to its Board of Directors, when the report was requested only to supplement the utility's own extensive environmental study and did not affect the resolution to take the property of each of the two owners in the present action.

ASSIGNMENT OR ERROR NO. 3-A. The trial court erred in ruling that at the time the Cincinnati Gas and Electric Company determined the specific route of the proposed transmission line, it did not have the benefit of the study of the outside environmental consulting firm.

ASSIGNMENT OF ERROR NO. 4. The ruling of the trial court that the interests of the people who were affected by the proposed transmission line were not considered by the Cincinnati Gas and Electric Company in its determination of the specific route for the proposed transmission line is completely without support in the record and is therefore contrary to the manifest weight of the evidence.

1. Article I § 19 of the Constitution of Ohio provides that –

> "Private property shall ever be held inviolate but subservient to the public welfare . . ."

The General Assembly has established the public policy that electric utility companies may exercise the power

of eminent domain for the public welfare as provided in R. C. § 4933.15. Such section provides that "The right of appropriation shall be exercised in the same manner provided by section 163.01 to 163.22, inclusive, of the Revised Code."

Section 163.09 R. C. provides that only three issues may be made by answer of the owners – (1) The right to make the appropriation; (2) The inability of the parties to agree; and (3) The necessity of the appropriation. The burden of proof is upon the owners and the resolutions of necessity by the respective boards are prima facie evidence of necessity in the absence of an abuse of discretion by the Agency.

> "In a proceeding by a private corporation to appropriate an easement for the construction of an electric transmission line, the necessity of the appropriation which the corporation is required to prove, is a reasonable necessity rather than an absolute necessity."
>
> *The Ohio Edison Co.* v. *Gantz,*
> 109 Ohio App. 127 (1958).

The *Gantz* case was decided prior to effective date of Chapter 163 R. C. when the burden of proof of necessity was on the corporation, but the quality and character of the term "necessity" has not changed.

> *Giesy* v. *Cincinnati, Wilmington and Zanesville Rd. Co.,* 4 Ohio St. 308, 327.
>
> 19A Ohio Jur. 2d p. 172 § 74.
> 29A C. J. C. 373, 374, § 90.

Where two lines for an electric transmission line are possible it is discretionary with the appropriating agency to select the route it will follow, and in the absence of

fraud, bad faith or gross abuse of discretion, such determinations will not be disturbed by the court.

> *The Ohio Edison Co.* v. *Gantz,* supra.
> *Jones* v. *Village of Maumee,* 20 Ohio App. 455,
> *Cleveland and Pittsburg Rd. Co.* v. *East Liverpool,* 51 W. L. B. 599,
> *Cotabish* v. *Cleveland Electric Illuminating Company* 28 Ohio App. 198.

This appears to be consistent with the general rule.

> ". . . In the absence of legislative restriction, the delegation of the power of eminent domain gives the grantee of the power the right to determine the location and route of the improvement and of the land to be taken for it and such determination will not be interfered with by the courts if it is made in good faith and is not capricious or wantonly injurious, or in some respects beyond the privilege conferred by the charter or statute. Evidence that another route is feasible is not sufficient to show that the grantee's selection constitutes bad faith, oppression or abuse of power.
>
> The landowner cannot raise the objection that there is no necessity for condemning his property because some other location might be made, or some other property obtained which would be more suitable."
>
> 29A C. J. S. 376-378 § 91.
>
> "The landowner's objection that some other site would serve just as well is not sustained by the courts for the reason that every other property owner could make the same objection, and if such objection has merit, then the project could never be built and the effect of the eminent domain statute becomes nugatory."
>
> Jahr, *Eminent Domain, Sections* 32, 51.

A recent case of interest is *Board of Education* v. *Holding Corp. of Ohio,* 29 Ohio App. 2d 114 (1971). There the Columbus Board of Education attempted to appropriate land for school purposes and the trial court denied such right. Apparently the court was influenced by the fact there was no ingress or egress to the property and the Board would not make immediate use of the same. The Court of Appeals reversed because it found no fraud, bad faith or abuse of discretion on the part of the school board.

The case of *Ohio Power Company* v. *Diller,* 18 Ohio App. (2) p. 167, has similar facts to the instant case. Ohio Power Company sought to appropriate lands of Diller for use as a transmission corridor. Defendant landowner appealed and the Court of Appeals affirmed, finding that the owners had not shown an abuse of discretion.

It should be kept in mind that we are here dealing with two statutory actions consolidated for trial. They are based on the eminent domain statute. They are not equity cases where broad equitable relief may be requested and granted. They do not constitute class actions. They deal only with two parcels of land out of a possible hundred or more parcels along the line. What the situation may be ten miles down or up the line from the parcels of these two owners is hardly cause for finding an abuse of discretion by the Agencies as to the defendants' land. As far as the court can determine from the record there is nothing to justify the trial court's finding of an abuse of discretion in routing the line over these two parcels.

The trial court emphasized that about sixty-percent of the line was changed from the original. Much of this was to meet the objections of the property owners involved. Had the Agencies remained adamant and refused to make changes where possible they no doubt would have been

severely criticized for not listening to the landowners and such intransigence would have been used to show the Agencies' lack of concern for the owners. We do not feel that this affected the defendants because the route was not changed over their property after the cases were filed.

The trial court in its opinion strayed far afield when it was pointed out that with all the changes it would still be necessary to cross defendants' land; and the trial court drew a parallel with the Criminal Search and Seizure law and said that this would prevent crossing defendants' land as Fruit of the poisoned tree. We fail to see the application of this reference to these cases. Accordingly, assignment of error number one is sustained.

2. Nor does this Court believe that the officers and management of the corporation owed a duty to the landowers to consult with the Board of Directors as to these changes. The trial court found that the Board had admitted that the details of the route was left to management's discretion. The right of the Directors to delegate authority to subordinate officers and agents in order to carry on the day-to-day functioning of the corporation is beyond question.

> 12 O Jur (2d) 508 § 404, p. 579 § 471.

We know of no reason why this rule should be otherwise in these cases. In fact, the top officers of management were also Directors of the Agencies and as such knew that changes in the route were being made.

> "When a petition for condemnation has been filed on behalf of a corporation by its executive officers, the owner of land sought to be taken cannot raise the objection that the directors of the corporation had not voted to authorize the filing of the petition."

See *Indiana and Michigan Electric Company* v. *Miller*, 19 Michigan App. 16, 172 N. W. 2d 223, 230-231 (1969), which quoted the above passage as authority.

It is also interesting to note that Section 163.05 (B) Ohio Revised Code, provides in part as follows:

> "Section 163.05 Petition for Appropriation.
> An agency . . . may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or interest or right therein. The petition of a private agency shall be verified as in a civil action and all petitions shall contain:
>
> '(B) In the case of a private agency, a statement that such appropriation is necessary, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate;'."

It does not require a resolution of the Board of Directors, but only a plain statement that the appropriation is necessary. Accordingly, assignment of error number two is sustained.

3. We come now to the question whether the Agencies were guilty of bad faith and abuse of discretion in not submitting an environmental report to its Board of Directors. This report, commissioned to an independent consulting firm in January, 1974, and delivered to the Agencies at about the time of trial, was not submitted to the Board of Directors, but its executive officers had knowledge of its recommendations before the trial and adopted many of them. Again, we say that failure to obtain approval of the Board of Directors is not fatal and does not constitute either bad faith or an abuse of discretion. Accordingly, assignment of error number three is sustained.

3A. Exception is taken to the court's finding that the Environmental Study should have been made before the route was planned and that the Directors should have had such report before them at that time. There has been in recent years an awakening of our concern for the environment. Both Congress and the Ohio General Assembly have taken steps to protect the environment. Ohio adopted a Power Siting Act effective October 23, 1972, with respect to Utilities but provided for a two year grace period running to October 23, 1974. In other words, the Act did not apply to control Utilities construction commenced prior to October 23, 1974. See R. C. 4906.05.

Nevertheless, the Agencies owe a duty to defendant landowners to give serious consideration to the effect of this line on the properties of defendants. No doubt, it would have been wise if they had ordered the consultants report before they planned the line. It doesn't follow however, that the failure to do so constituted bad faith or abuse of discretion. The record shows they made their own studies of the effect on the environment and that as they received recommendations from time to time while the outside study was being made, they gave consideration to such recommendations. It seems fair to observe at this point that no matter where this line is routed, the environment will suffer and some landowner will feel aggrieved. Again, it is a question of balancing the public need for electric service against such damage. Accordingly, assignment of error three-A is sustained.

4. Appellants claim the court was in error in holding that the Agencies gave no consideration to the interests of people affected by the proposed line and that such holding is against the manifest weight of the evidence. The record shows that after the initial survey of the route, the Companies contacted defendants and other affected

owners. They explained the purpose of the line and where it would pass over defendants' property – and the line was moved to another part of the Nieman property. There was even a meeting with citizens of the area as early as May, 1973, to discuss the line, at which meeting brochures explaining the need for the line were distributed. Federal guidelines of the Department of Interior and Department of Agriculture were considered and followed where possible. There was nothing in the law at the time that required public hearings or newspaper notice of the contemplated construction. Chapter 163 R. C. and specifically § 163.09 does not require public notice or public hearings. Perhaps, the questions involving environment will never again occur in future constructions because of the requirements of the Power Siting Act. But, as to these particular cases we do not believe the failure of the Agencies to have before them the Environmental report constituted either an abuse of discretion or bad faith.

We do not find anything sinister on the part of the Agencies, in the court's reference to "the deep dark secret rooms of the drafting department" nor can we equate the conduct of the Agencies in planning this line, with Watergate. We find from the record that the appellants made every reasonable effort to inform the defendants and were unsuccessful in their negotiations with defendants and that the judgment of the court to the contrary is manifestly against the weight of the evidence.

Abuse of discretion has been defined as implying not merely an error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency.

Alliance v. *Joyce*, 49 Ohio St. 7, 22.

Bad faith has been defined as importing a dishonest purpose, moral obliguity, conscious wrongdoing, breach of a

known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.

Slater v. *Motorists Mutual Ins. Co.*, 174 Ohio St. 148.

We find that the record does not sustain a finding that the Agencies were guilty of bad faith or abuse of discretion.

We accordingly find the trial court was in error in finding that the Agencies abused their discretion and acted in bad faith. Assignment of error number four is sustained.

Although the defendants prevailed in the trial court, they have filed their cross-appeals contending that Chapter 163 R. C. is unconstitutional. The trial court judgment found that Chapter 163 R. C. was constitutional. Defendants-appelles have filed six assignments of error, which are:

I. Chapter 163 of the Ohio Revised Code is an unconstitutional attempt of the Ohio Legislature to repeal the law of the land as it pertains to appropriation proceedings and purports to establish a procedure whereby private property may be appropriated without providing the due process of law to the property owner.

II. The provisions of Chapter 163, Ohio Revised Code, violate the most elemental notions of what constitutes due process in an appropriation of private property context.

III. The Court of Common Pleas erred in ruling that the defendants were not entitled to adequately prepare their case in accordance with the discovery provisions of the Ohio Rules of Civil Procedure.

IV. The failure of the Court of Common Pleas to rule upon the defendants' motions pertaining to discovery constituted a denial to the defendants of the

due process of the law and deprived them of an opportunity to adequately prepare and present their case on the merits.

V. The ruling by the Court of Common Pleas setting a trial date of August 29, 1974, constituted an unconstitutional deprivation of due process and prohibited the defendants from adequately preparing their case.

VI. The provisions of § 163.09, Ohio Revised Code, unconstitutionally placed upon these defendants the burden of proving the negative of a proposition, concerning which all of the relevant facts were in the possession of the plaintiffs.

Appellants contend that this is an improper cross-appeal; that it is an attempt to appeal from a finding and not a judgment; and that the appellee was the prevailing party and consequently suffered no prejudicial error.

Appellees raised this constitutional question in the trial court and, if denied their cross-appeal, it would mean that they would have no way of continuing to urge the unconstitutionality of Chapter 163. If it is unconstitutional, then the entire proceeding in these cases fails and there would be no right to take these properties at all. We believe we should entertain such cross-appeal and deal with the issues raised therein.

Assignments I and II are related and will be considered together. They claim Chapter 163 R. C. denies due process of law under the Federal and State Constitutions.

"Generally speaking, the guaranty of due process of law was designed as security against arbitrary action, its purpose being to exclude arbitrary power from every branch of the government. Arbitrary action constitutes a denial of due process, and in certain proceedings such action may be the only basis for a claim of denial of due process."

11 O Jur 2d 48 § 696; 19A O Jur 2d p. 83 § 8; 19A O Jur 2d p. 390 § 242.

"The fundamental requirement of due process of law is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which constitutional protection is involved."

Anderson National Bank v. *Luckett,* 321 U.S. 233.

Pursuant to Art I § 19, and to provide a procedure for the exercise of the power of eminent domain, the General Assembly enacted the Uniform Eminent Domain Act, being Chapter 163 R. C. Defendants complain that the procedure as set up in Chapter 163 does not give them sufficient time to prepare their case and therefore denies them due process. A similar claim was made with respect to § 163.08 that the 30 day limit on filing an answer was too restrictive and denied them a jury trial, in the case of *City of Cincinnati* v. *The Bossert Machine Co.,* 16 Ohio St. 2d 76. The Supreme Court in that case held § 163.08 and 163.09 to be constitutional.

The court in *Ohio Power Co.* v. *Diller,* supra, considered R. C. § 163.09 with respect to placing the burden of proof on the landowner, and declared it to be constitutional. With respect to the timetable for preparation and trial of appropriation cases, who is to say what is a reasonable time to prepare and try the case? That duty falls on the General Assembly. In these cases we hold that defendants had an opportunity to be heard and that the proceedings were adequate to safeguard their rights. There was no violation of defendants' due process rights. Assignments I and II are overruled.

Assignments III and IV claim the court erred in its ruling that defendants were not entitled to discovery under the Rules of Civil Procedure and that the failure of the court to rule on their discovery motions denied them due process of law. We sustain the action of the trial court in holding that Rule I (C) of the Rules of Civil Procedure excepts appropriation cases from its operation, and in holding that R. C. § 163.10 limits the deposing of witnesses on cross-examination to officers, employees, or agents of the Agency. This does not include Directors. It should be noted, however, that the top three operating officers of each Company, who were also directors, were deposed. This is a procedural matter, established by the legislature and discovery gives rise to no constitutional question. The failure of the court to rule on subsequent motions for discovery amounted to a denial of the motions, but under the circumstances we find no denial of due process and Assignments III and IV are denied.

Assignment of Error No. V is a restatement and enlargement of the first four assignments. Specifically it complains that the trial date of August 29, 1974, did not give defendants enough time to prepare their case. R. C. § 163.09 provides that the hearing on the question of necessity shall be held no less than five nor more than fifteen days after filing of an answer. In these cases the court set the trial date on August 29, which was 72 days after filing the cases. The record in the cases is quite extensive, including many depositions taken by defendants. It reflects diligence in preparation on both sides. Again, we say this timetable is legislative. We do not find it amounts to a violation of defendants' due process rights. Assignment of Error No. V is overruled.

In defendants' final Assignment of Error No. VI, it is claimed that placing the burden on the property owners

to prove lack of necessity for the line, was unconstitutional. Prior to the passage of Chapter 163 the burden was on the corporation to prove necessity.

"The General Assembly of this state has authority to prescribe the circumstances that shall constitute prima facie evidence of a fact in issue in an action on trial in the courts of this state, whether the cause of action to which it relates arose within or without the territorial limits of the state."

The Pennsylvania Co. v. *McCann*
54 Ohio St. 10

Ohio Power Co. v. *Diller*
18 Ohio App. 2d 167

We see no constitutional violation of defendants' rights and Assignment VI is overruled.

We find that the record does n sustain a finding that the Agencies were guilty of bad faith or of abuse of discretion in their actions in laying out and attempting to construct the transmission line across the property of the parties defendant. We accordingly hold that the trial court was in error in finding that the Agencies abused their discretion and acted in bad faith. Accordingly, we reverse the action of the trial court and remand these cases to the Court of Common Pleas of Butler County, Ohio, for further proceedings not inconsistent with this Opinion.

BUZZARD, P. J., CRAWFORD and STRAUSBAUGH, J. J.

BUZZARD, P. J., AND CRAWFORD, J., RETIRED, AND ASSIGNED TO ACTIVE DUTY UNDER AUTHORITY OF SECTION 6 (C), ARTICLE IV, CONSTITUTION.

STRAUSBAUGH, J., OF THE TENTH APPELLATE DISTRICT SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX 2

---

§ 163.06 *Deposit with court; appraisal of structures.*

(A) A public agency, other than an agency appropriating property for the purposes described in division (B) of this section, which qualifies pursuant to Section 19 of Article I, Ohio Constitution, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated. The right of possession upon deposit as provided in this division shall not extend to structures.

(B) A public agency appropriating property for the purpose of making or repairing roads which shall be open to the public, without charge, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and stated in an attached declaration of intention to obtain possession and thereupon take possession of and enter upon the property appropriated, including structures situated upon the land appropriated for such purpose or situated partly upon the land appropriated therefor and partly upon adjoining land, so that such structures cannot be divided upon the line between such lands without manifest injury thereto. The jury, in assessing compensation to any owner of land appropriated under this division shall assess the value thereof in accordance with section 163.14 of the Revised Code. The owner or occupant of such structures shall vacate the same within sixty days after service of summons as required under section 163.07 of the Revised

Code, at no cost to the appropriating agency, after which time the agency may remove said structures. In the event such structures are to be removed before the jury has fixed the value of the same, the court, upon motion of the agency, shall:

(1) Order appraisals to be made by three persons, one to be named by the owner, one by the county auditor, and one by the agency. Such appraisals may be used as evidence by the owner or the agency in the trial of said case but shall not be binding on said owner, agency, or the jury, and the expense of said appraisals shall be approved by the court and charged as costs in said case.

(2) Cause pictures to be taken of all sides of said structures;

(3) Compile a complete description of said structures, which shall be preserved as evidence in said case to which the owner or occupants shall have access.

(C) Any time after the deposit is made by the public agency under division (A) or (B) of this section, the owner may apply to the court to withdraw the deposit, and such withdrawal shall in no way interfere with the action except that the sum so withdrawn shall be deducted from the sum of the final verdict or award. Upon such application being made the court shall direct that the sum be paid to such owner subject to the rights of other parties in interest provided such parties make timely application as provided in section 163.18 of the Revised Code. Interest shall not accrue on any sums withdrawable as provided in this division.